# THE MALPRACTICE CRISIS IN OBSTETRICS AND GYNECOLOGY: IS THERE A SOLUTION?

HUGH R.K. BARBER, M.D.
Director
The Department of Obstetrics and Gynecology
Lenox Hill Hospital
New York, New York

"And Jesus said, woe unto you also, ye lawyers!"

DISASTER STRUCK AMERICAN MEDICINE in the 1960s when the malpractice litigation ripoff began its wild and sweeping escalation. It was the beginning of the end of the best health care delivery system that the world has ever known. It was born out of lawyers' greed, many of whom feared unemployment when the no-fault insurance bill was passed.

The real problem is too many law schools and too many lawyers; the number of lawyers has grown twice as fast as the general population. It is obvious that practically anyone can enter law school and few are ever asked to leave law school. Although we are virtually inundated by unemployed lawyers, we continue to turn out 50,000 every year.

It is surprising that a profession surrounded by so shady a reputation has been able to thrive and at present rules the greatest and most affluent nation the world has ever known. No solution is in sight, but like many intolerable situations there is hope that there will be an uprising against this monstrous injustice.

When Willie Sutton was asked why he robbed banks, he replied, "Because that's where the money is." This explains why there are so many malpractice suits.

Many lawyers have made a mockery of justice and have earned the contempt of the public and even of their own colleagues. No-fault automobile insurance marked the beginning of the medical malpractice gold rush for the lawyers. Ninety five percent of all malpractice suits in the United States have been filed since 1964. The lawyer became the winner, the patient the loser, and physicians were totally disillusioned by their patients' ingratitude. This disaster culminated in 1974 in an unbelievable series of crises with physicians on strike, hospital services cut except for emergencies, and acrimonious and

inflammatory confrontations between legislators and physicians making daily newspaper headlines. For the first time in modern memory, open warfare broke out between physicians and lawyers. Wounds were inflicted which to this day remain unhealed. There is very little prospect for peace without major changes in the law, changes blocked by legislators, many of whom are lawyers with an obvious conflict of interest, blocking reasonable demands for relief made by practicing physicians.

## THE CONTINGENCY FEE

The contingency fee is an invitation to barratry and champerty. A major factor in the medical malpractice crisis is the contingency fee and its accompanying evil, the fee split or kickback. Physicians are not allowed to split fees. Why should lawyers be allowed to? If the contingency fee and the fee split or kickback to the referring lawyers and payoffs to runners and case finders were outlawed, malpractice claims would plummet with immediate and dramatic relief of the current crisis. Lawyers claim that without contingency fees the poor would lose their "key to the courthouse" and would not be able to sue a physician or hospital. The answer is that lawyers should emulate physicians by giving their services without fees to their clients who cannot afford them. Lawyers who are making a fortune from the medical malpractice ripoff have become great protagonists for contingency fees and with tears in their eyes state that without it the poor could not get legal aid. This distorts the truth because in actuality just the opposite has occurred. Since lawyers work for a contingency fee rather than for a fee-for-services rendered (as do 99% of other professionals), the larger the award the greater their remuneration. Human nature being what it is, what cases do you think receive the majority of attention? The sensational cases, especially those for which juries might make tremendous awards, rather than those in which it is difficult to disprove a cause and effect for an injury, such as obstetrics and neurosurgery.

Negligence for which no large monetary award would be forthcoming receives little or no attention, no matter how obvious the error. It is akin to suing someone with no assets—you cannot collect anything. So instead of helping the little man's access to the legal system, the contingency fee does so only if the case in point promises the possibility of a large settlement. All physicians recognize that some very grave injustices in medical care occasionally occur, but if such a case will not bring recoverable damages, the physician escapes reprimand because no lawyer is interested in the case. A knowledgeable panel would impartially review all cases involving negligence

without regard to those that might bring a large fee. The legal profession will fight to the death to block anything as logical as this.

## PROFESSIONAL EXPERT WITNESS

A whole new career has opened up for some of the inadequate physicians who cannot compete in the practice of medicine. They become hired guns, available for a fee. The medical profession does have prostitutes. The great damage that the malpractice threat has brought about is that the patient-physician relationship has been destroyed and every patient now is considered a potential adversary.

Murray A. Freedman,[1] in his book *Society to L&D Stat! Stat! Stat! Stat!* makes an excellent point. He states that suppose we put the police (traffic cops) on a contingency basis, that is, 35% of their ticket would go into their own pockets. Can you imagine how many tickets would be written? And for how many minor infractions? The system could not function. Everyone would constantly be getting tickets. At least one third of the drivers would qualify for tickets on a daily basis—either for something they did or did not do. The contingency fee for such policemen would create havoc. The anxiety created might take the joy out of driving.

## DEFENSIVE MEDICINE[2]

We are now at the vortex of a malpractice storm with no relief in sight. The issue is not only legal, although reform in the adversarial tort system is necessary, it is not even an issue where patients play a litigation lottery, seeking legalized retaliation for real or imagined injury. Every physician accepts that reasonable compensation should be given for a real injury when the physicians are at fault. The malpractice issue is not only economics, with huge awards for pain and suffering, but escalating cost for defensive medicine which insurance carriers pass on to health care providers. The issue may be one of social justice. Justice for the injured party but also for the vast majority of truly conscientious and competent physicians who are doing the best job they can humanly do. The greatest cost of the malpractice ripoff is the emotional injury that a physician experiences when he believes that he has done the best possible under difficult circumstances. Decreased physician productivity because of such dysfunction cannot be estimated.

## CEREBRAL PALSY[3,4]

In New York State the highest awards are for the so called "brain damaged baby" or the baby with mental retardation. There may be more suits in

gynecology, including those for abortions, tubal ligations, laparoscopy, misdiagnosis of ectopic pregnancy, and the "misdiagnosis" of breast cancer.

The highest awards in the State of New York in obstetrics and gynecology are related to cerebral palsy. It cannot be denied that the physician is sometimes at fault for an unfavorable outcome, but to hold the obstetrician entirely responsible for a case of cerebral palsy is absurd. The problem of brain damage is too complex. A physician testifying as a so called expert witness who makes such a claim in court must be morally bankrupt or completely uninformed about basic problems relating to pregnancy, delivery, and neonatal course.

Very little cerebral palsy is due to birth trauma or acute anoxia. Psychologists, psychiatrists, and pediatricians often speak of brain damage in a child in a way that imputes blame to the physician or midwife who delivered the baby. The question of who is at fault must be raised so that steps may be taken to correct the injustice done to the physician and the harm done to the children. The physician is the butt of the malpractice litigation but the life style and genetics of the parents of the compromised child must be the keynote for the defense of obstetricians under siege in these malpractice cases. In the current medical legal climate, a casual query of "perinatal asphyxia" on an infant's chart is a potential disaster for the physician. But can the brief episode of hypoxia that routinely occurs during delivery actually lead to mental retardation or cerebral palsy? Intrapartum hypoxia is a routine occurrence during vaginal birth but is absolutely unlikely to cause major sequelae. Chronic or repeated antepartum hypoxia, however, can contribute to neurologic defects. Reports indicate that about 2% of severely asphyxiated babies consequently develop cerebral palsy. It is becoming evident that injury to the fetal brain is already present when the asphyxia is recognized. Asphyxia is the result of chronic insult, not the cause of cerebral palsy.

Assuming that the fetus is already compromised, it is obvious that labor cannot proceed in a normal manner. Even with careful monitoring and an aggressive plan for delivery in case of asphyxia, cerebral palsy is no more frequent in emergency deliveries than uncomplicated deliveries. This would indicate that the damage has been done over a long period and is unrelated to the intrapartum period of the delivery. Reports by many authorities in various institutions show that "a poor reproductive history is a significant causative factor in cerebral palsy." Family history and parental life style affect fetal outcomes.[5] With accumulating support in the literature, a defense lawyer can show that reasonable doubt exists and that the physician is not responsible for fetal brain damage when perinatal asphyxia is present . If the obstetrician

becomes involved in a suit he or she and the lawyer must take the offensive and make the plaintiff's attorney prove that genetics and lifestyle did not cause the brain damage. Many neurologic disorders, notably mental retardation, have a genetic component. As most courts do not allow genetic testing of plaintiffs after a lawsuit is filed, it is important to obtain studies on questionable infants at birth.[6]

It has been shown that decelerations in fetal heart rate do not necessarily indicate fetal distress, especially in the presence of good beat to beat variability. Research projects suggest that demonstrable acidosis must be present for at least one hour to cause neurological sequelae. It is important to document fetal condition by use of fetal capillary scalp pH. Apgar scoring, especially at one and five minutes, is not a sensitive predictor of neurologic defects.[7] Cord blood gas values obtained at birth are a more reliable indicator of a distressed infant that may have suffered brain damage. To protect fetal health and to minimize the risk of liability, the physician should document maternal smoking, drinking, drug abuse, and weight restrictions during pregnancy; warn the parents of the complications associated with intrauterine growth retardation and if the infant is premature explain the increased likelihood of cerebral palsy and mental retardation to them before delivery; carefully follow postdate pregnancies; obtain cord blood (umbilical arterial blood) gas values ($pH \geq 7.2$; $PO_2$(mm Hg)$\geq 15$; $PCO_2$ (mm Hg)$< 50$; $HCO_3$ (Mol/L)$\geq 18$) at the moment of birth in cases of complicated labor and delivery, nonreassuring electronic fetal monitoring tracings in difficult delivery; obtain genetic studies since such intrauterine infections as rubella, cytomegalovirus, and toxoplasmosis may be present; cord blood samples should be obtained whenever a questionable infant is born; obtain placental surgical pathology studies on questionable babies, making sure that the pathologist keeps a properly labelled piece of placenta in a preservative for an indefinite period. Special care should be taken to look for perivascular collections of inflammatory cells in the villi, and a complete description of infarcts, thromboses, and placental size and shape should be given; talk to the pediatrician to insure that a diagnosis of perinatal asphyxia is not made without such concrete evidence as cord arterial blood gas values. A casual diagnosis can be extremely damaging.

## GYNECOLOGIC PROBLEMS[8]

Gynecologic surgery generally involves fewer complications than some other surgical encounters and, therefore, potential liability is somewhat reduced; however, there is no special immunity from error or injury in gyne-

cologic surgery and surgeons must direct special attention to a variety of zones of risk inherent in such surgical encounters.

Diagnostic issues account for about 15% of claims. Treatment issues are the basis of legal claims in about 40% of cases. For surgeons these factors present a formidable risk that must be translated into a manner of practice to minimize the risk of delay in diagnosis, misdiagnosis, or failure to diagnose.

For gynecologists special areas of risk involve breast disease, surgical injury, infection, and problems related to contraception and sterility.

Surgical injury, particularly bowel and urinary injuries, are also common enough to merit special consideration and participation; postoperative infection is the most common complication. When such an injury occurs (nicked ureters, perforation of the uterus, and so on) appropriate steps in management must be taken.

Problems related to contraception and sterilization account for many claims against gynecologists. Incomplete abortion, failure to diagnose or mismanagement of ectopic pregnancy, and failed sterilization procedures are common areas of risk.

Medication issues account for about 7% of claims and equipment or facility-related injuries account for about 3%—both percentages are small, but nevertheless, both areas contribute to the surgeon's liability exposure. The administration of drugs and the care and maintenance of office and hospital equipment require the surgeon's awareness and understanding. No drug or item of equipment should ever be used without full knowledge of its function and of possible complications. The plaintiffs' lawyers take particular care to quote the *Physician's Desk Reference*. Unfortunately, if the gynecologist were to follow this closely, he would probably not use any drugs because it lists every complication imaginable for each drug.

In addition to issues already raised, gynecologic surgeons have a unique level of liability exposure in the performance of laparoscopy, laparotomy, cancer screening, hysterectomy, oophorectomy, abortion, and conception control. Professional services related to these special areas of risk should incorporate the highest degree and quality of communication, informed consent, attention to detail, record keeping and case follow-up.

Two emerging zones of professional liability for gynecologists are contraception and sterilization procedures. Inappropriately prescribing or inserting methods or devices, ignoring or failing to identify contraindications, and failing adequately to manage complications, all expose a physician to lawsuits. In sterilization procedures the gynecologist is sued often on the basis of failures of informed consent or of negligence in performance of procedures:

the patient expects to be sterile and then becomes pregnant. Such cases lead to claims of "wrongful birth" or "wrongful conception." There may be recovery of claims even if the fetus is aborted. Therefore, it is imperative that the gynecologist explain in detail and to the patient's full understanding the possibility that sterilization can be unsuccessful and the consequent risk of a pregnancy. Since most states now recognize the right of action of wrongful birth, this area of professional liability must be effectively managed. It can be, with a careful discussion of the procedures with the patient.

Every gynecologist encounters unexpected problems, unanticipated complications, and actual errors of skill and judgment. Management of these events is critical as to whether a law suit results.[9] The first and most important step is to avoid concealment, subterfuge, lying or minimization of the injury in communicating with the patient and her family.[10] Honesty is the best protection from a legal viewpoint and the most effective medical course. A calm, uninterrupted conversation should be conducted with the patient, explaining precisely what occurred and what will be necessary to mitigate the damage. The words "negligence" and "malpractice" should be avoided. At the first opportunity, a full report of the incident should be shared with the insurer; and in the hospital the incident should be reported to the risk management team or legal counsel, as well as the chief of service or department head. At first, attention must be paid the patient and her problem resolved.

The law offers protection and privilege for gynecologic surgeons, and careful practitioners will familiarize themselves with local rules and regulations, as well as general concepts, such as those accepted as standard practice for the country. In this way physicians may not only function as surgeons but also be comfortable with the liability that is a basic element of their position of trust and their professional relationship with patients.[9]

## TORT REFORM[12]

Since the mid 1970s, nearly every state has enacted legislation to reform the civil justice system. The goal was to bring some stability to medical malpractice insurance rates and premiums which had been experiencing nearly uncontrollable growth. It was thought that tort reform legislation, if given the chance to work, would bring some predictability to malpractice awards and hence to malpractice insurance premiums. However, the total claims paid by medical malpractice insurers and the total malpractice premiums paid have grown rapidly since 1980. Total claims paid by insurers increased 264% from 1980 to 1987. Total medical malpractice insurance premiums paid by physicians and hospitals grew 235% during that time. The

continuing high cost of malpractice insurance has caused some in the health care community to look beyond the courts for relief.

Malpractice insurance premiums continue to rise even after most states have passed tort reform laws. Consequently, interest is growing in ways to resolve malpractice claims outside the courts. California and Indiana have had some success in controlling the medical malpractice report.[11,12] California has a comprehensive tort reform that has been passed. It has placed a cap on noneconomic damages, periodic payment of damage awards and limits on attorney's fees, particularly the contingency fee. Indiana legislature passed a law to limit to $100,000 the risk to be underwritten by the insurance companies for an individual health care provider. Providers have the responsibility for the first $100,000. The rest of the award is paid from a patient compensation pool that is funded through surcharges or premiums.[15,16]

## OUT OF COURT ALTERNATIVES

Many ideas have been published relating to nontraditional approaches to the medical malpractice crisis. Approaches recommended include contracts, arbitration, patient compensation funds, medical offer and recovery, and scheduled benefits. Each has advantages and disadvantages. The one big disadvantage is that without support of state legislatures and/or the national government, the Trial Lawyers Association will try to have them rendered invalid.

The Greater New York Hospital Association has proposed a plan that has merit: that malpractice claims be investigated first by a claims reviewer and, if not resolved, then by a hearing examiner whose decision would be subject to review by a medical board. Only if the claimant were not satisfied would the case be heard in a courtroom.

However, the decision would be made by a panel of judges, not by a jury. A defense for this is that a jury recently awarded more than a million dollars to a psychic who purportedly lost her powers after a CT scan. It is curious that this lady's cryptic powers were worth far more once lost than they could have every been worth in reality. Fortunately, this was overturned by a higher court.

The only way the jury system could function in a just manner would be that everybody must serve on a jury and this would include physicians, lawyers, beggarmen, thieves, clergymen, bankers, etc. The first six or 12 or whatever alternates are needed would constitute the jury with no way for either the plaintiff or defense lawyer to challenge the jury. Random selection in this way would make it fair. Neither a strong plaintiff's attorney nor a defendant's

attorney could then pick a sympathetic jury. Modern medicine is too complicated for the average person serving on a jury to understand what the issues are. The jury is left with emotions and sentiment in making a decision. Hence I favor a three or four judge panel knowledgeable in the science of medicine. America is at the crossroads, and the solution of the malpractice crisis may save or break the country. Justice delayed is justice denied.

In the 1920s and early 1930s patients with serious medical problems often had to leave the United States for treatment. The United States is once again on this path and, if corrections are not made, patients may once again have to leave the United States for optimal care. The civil justice system is on trial and, unless justice triumphs, the best health care delivery system ever developed will be destroyed. Lawyers, who should protect the laws of the land, will be the final executioners. Their daughters and granddaughters will seek an obstetrician and none will be available. Their condemnation of their fathers and their grandfathers will be justified.

## THE PROBLEM

There are more than three times as many malpractice suits in the United States as there are in any other country. Although only 6% of the world's population lives in the United States, yet 66% of the world's lawyers live here. Forty thousand students get law degrees in the United States yearly. Currently there are more than 700,000 lawyers in the United States, and it is predicted that the figure will exceed one million by the year 2000. It is obvious that lawyers are advertising and employ people in hospitals and health care centers to identify any problem that may exist whether or not it has any merit.

Seventy three percent of the obstetricians in the United States have been sued at least once. An obstetrician can expect eight suits during his or her career. Each will last two to five years before settlement of the case. Therefore, obstetricians can easily spend an entire career either being sued, recovering from the ravages of a suit, or preparing for the next!

## EMOTIONAL IMPACT OF LITIGATION

Nearly 40% of physicians who have been sued as well as nonsued experience a major depressive disorder related to professional liability risk exposure. Many exhibit pervasive anger accompanied by four or more of the following symptoms: depressed mood, inner tension, frustration, irritability, insomnia, fatigue, gastrointestinal symptoms, headache, difficulty concen-

trating, diminished appetite, and reduced sex drive. It has affected families and has had other physician's children change their careers from medicine. It has caused a great brain drain as far as the medical profession is concerned.

It has had a devastating effect on the talent that is attracted to medical school and the number of applicants. Contingency fees and huge awards are contributing directly to the demise of the quality of medical care. A true crisis exists now! As to medical school applications, in the mid 1970s there were five applicants for each position available, in 1987 it was 1.7, in 1988 it was 1.3. Twenty percent of the class accepted for the fall of 1987 declined acceptance. Medical school applications have declined, both in quantity and quality. This will affect the future of medicine in the United States.

## PHYSICIANS MUST FIGHT BACK

The physicians have a responsibility to their patients to preserve what is left of the best health care delivery system the world has ever known. Physicians have strength on their side. The public has always given personal physicians the highest degree of trust. Polls show that patients always rate their personal physician as the most respected person n the community and the one who possesses the highest ethical standards. Physicians must work with and educate their patients and the public to the dangers of the malpractice ripoff. It may be the strength of physicians in fighting this monstrous injustice.

## SUMMARY

The malpractice ripoff began when the no-fault automobile accident law was passed. Many lawyers were in a panic at this time and turned to medical malpractice litigation to make a living. It became the conduit to quick wealth. The patient was the loser, the lawyer the winner, and the physician often devastated by the patient's ingratitude.

For a patient-plaintiff to maintain a successful lawsuit for medical negligence against a physician, four elements must be alleged and proved in a court of law:[15] duty, breach of duty, causation, and damages.

Each must be proved by a patient to prevail against a physician. Since this is very difficult to do, the lawyers have subtly brought in a new approach called maloccurrence. This is defined as a bad outcome unrelated to the quality of care provided. The lawyers need not prove the four elements to win a malpractice case; many are won on deceit and in violation of the law by introducing the concept of maloccurrence.

Not only are tort reforms needed but out of court alternatives must be mandated by law or our health care delivery system will be destroyed.

Government interference and the malpractice ripoff has had a devastating effect on the talent attracted to medical school, and the number of applicants is falling rapidly. The medical malpractice crisis could soon be translated into a health delivery service crisis.

Concerned citizens must join together with the medical profession and leaders of the legal profession to halt this monstrous injustice.[14,15] The litigation milieu has not only paralyzed the health care industry but it has had a devastating effect across the board on the way Americans live and do business. It must be solved now for justice delayed is justice denied.

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